

NO. 83-416

FILED

NOV 3 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ELIZABETH Y. BYRUM et. al
Petitioners

v.

LOWE & GORDON, LTD.
Respondents

and

BARNEY L. BYRUM, et. al.
Petitioners

v.

GARY B. PATTERSON, LOWE & GORDON, LTD.
et. al.
Respondents

FROM APPEALS IN THE
SUPREME COURT OF VIRGINIA

REPLY BRIEF OF PETITIONERS ON LOWE AND GORDON'S
BRIEF IN OPPOSITION TO GRANT A WRIT OF CERTIORARI
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REPLY BRIEF OF PETITIONERS ON
LOWE AND GORDON'S BRIEF IN
OPPOSITION TO GRANT A WRIT OF CERTIORARI

Note: All emphasis are the Petitioners unless otherwise noted. This is a corrected copy so requested by the Clerk of the Court to use Pica type and double spacing. As a result,

the Reply Brief had to be reduced in content.

In Lowe and Gordon's Brief in Opposition to Grant the [Writ] of Certiorari, it is remarkably and repeatedly stated by counsel in opposition that the federal constitutional issues raised in the Petition for Writ of Certiorari, the following recitals being a few examples of such emphatic language, that state repetitively that the Constitutional issues were not raised,

"...in any lower Court in either case and have never been presented to any other forum."

"A careful review of the Motion to Vacate filed in April 1980, the Petition for Appeal through the Virginia Supreme Court...[that] only in the Petition for Rehearing did the Byrums even refer to the Due Process Clause"

All through Lowe and Gordon's Brief in Opposition such statements are made and at page 24 thereof Lowe and Gordon states,

"...they have now brought the matter to this Court, upon frivolous claims of federal questions."

All of those statements are an utter disregard for the truth and complete misrepresentations to the Highest Court of America.

Whether there is such federal questions in the cases is a matter that the Supreme Court must decide itself. Reece v. Georgia 76 S. Ct. 167, 169, 350 U.S. 85 (1955). (See also Urie v. Thompson 69 S. Ct. 1018, 1025-26, 337 U.S. 163, 171-173. (1949).) It is further policy and law of the U.S. Supreme Court that "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." New York ex. rel. Bryant v. Zimmerman 49 S. Ct. 61, 63; 278 U.S. 63. (1928). The Byrums present to this Court such exact stages that federal questions were raised, one being the very issue of due process that is placed before this Court and if the Byrums by inadver-

tence failed as alleged to comply with Rule 21(h) in their Petition, they submit the following in compliance.

I. IN THE CIRCUIT COURT OF
CHARLOTTESVILLE, VIRGINIA

a) In the Byrums' Motion to vacate

Default Judgment filed April 18, 1980:

1) Paragraph #6 - "That the defendants [the Byrums] claim their right to an evidentiary hearing on the merits..."

2) Paragraph #11 - "That notice to the Defendants by the plaintiff of the date for hearing on the Default Judgment was improper and not adequate..."

3) Paragraph #14 - "That the Defendants move the Court to vacate the Default Judgment pursuant to Section §8.01-428 of the Virginia Code ... and to file any other appropriate pleadings for an evidentiary hearing."

4) Paragraph #21 - "That the defendants have been denied their constitutional rights of due process and equal protection under the law by Plaintiff's actions, representations, and the like to gain a Default Judgment from the Court."

b) From Transcript of Hearing
on Above Motion, dated May 16, 1980, page
14:

1) Counsel for Byrums in Argument stated "I do not believe this is what our system of jurisprudence in Virginia stands for. I think these people are entitled to an evidentiary hearing and I believe §8.01-428(c) gives this Court that broad discretion..."

2) At page 20 of the said Transcript thereof, Counsel for Byrums stated:

"Well I don't believe we're here on the theory of fraud, Your Honor ... the service of process by the Secretary of the Commonwealth was sent back by the son of the Byrums, signed by him on the 25th of May and the order of this Court was entered on the 24th of May ... apparently they (the Court and Mrs. Lowe) never got any notice back when service was made and [to] whom it was made."

3) At page 22 of said Transcript:

"I think these people are entitled to an evidentiary hearing, as I stated before to the Court ... I don't think that Lowe and Gordon should fear having that sort of evidentiary hearing..."

4) At page 23 of said Transcript:

The Court: "...nothing we've discussed today falls within the purview of §8.01-428 and I don't see any way, in the opposition of the plaintiff to setting aside, the Court can grant your motion. I note your exceptions to my ruling ... I assume you except to my ruling. Byrums' counsel:" The grounds that I've argued is [are] our grounds." (Thus denying any constitutional claims made in the motion.)

C) From the June 17th 1980 Order of the Court.

"...nor does the Court find anything to merit vacating the default judgment...the Court further finds that there was no grounds for an independent action to attack or modify the judgment...the Defendant's Motion to Vacate the Default be and it is hereby denied..."

d) The Byrums' Motion to Vacate the June 17th 1980 Order.

Paragraph #3: "That the denial of the Court for the Defendants to have this cause tried on the merits...would constitute a manifest injustice upon them and violate their constitutional rights of due process and equal protection of the law..."

The lower State Court denied the motion and stated there was "no grounds." The federal issue was clearly raised, it was denied accordingly.

II. IN THE SUPREME COURT OF VIRGINIA

(Appealing the above)

a) From Byrums' Appellant Brief, to the Supreme Court of Virginia at page 14, under sub-title "Argument and Authority."

"The Byrums have directed this counsel to seek before this Honorable Court justice. They desire due process to be heard below by an evidentiary adversary proceeding on a creditor's disputed claim...Due process demands they should be heard before this creditor, an attorney, can take their life time savings invested in property away. The authority for that proposition is all too numerous to cite. The Virginia Constitution guarantees it as does the Federal Constitution."

b) At page 20 of the Byrums' Virginia Supreme Court Appellants' Brief:

"Due Process and justice would demand no less in this creditor - debtor situation but a full evidentiary hearing."

c) At page 24 of said State Court

Appellant's Brief

"The burden to prove notice is on his who alleges it and while the fact of notice may be inferred from circumstances as well as proven by direct evidence, the proof must be such as to affect the conscience of one whose rights are by the notice made to depend... Notice for a default and summary judgment was therefore improper for the lower court to rely upon for the basis of its Order of May 24, 1979."

d) From Byrums' Appellant's Reply Brief

in Said State Supreme Court.

"Due Process has never been served here when this sort of adjudication, entered even before the scheduled trial date of June 15, 1979 is created in this sort of manner. It violates the minimal tenet of fairness guaranteed by the Constitution...The simplest principles of justice and due process should readily afford the Byrums...an evidentiary hearing.

e) Byrums' Petition for Rehearing Before

the Virginia Supreme Court.

Page 3: "Certainly due process thereby would be denied in contradicting the rule set by our highest

Court for civil causes to affirm the default and summary judgment when the Byrums were not in default."

Page 15: "Due Process is truly lacking by all the circumstances considered and the record being clear that the Byrums were acting properly, complied with the rules..."

Page 22: "To sustain the judgment below under all these facts, circumstances, and the insurance of laws and procedures in Virginia shall deprive the Byrums of property or money with due process of law..."

III. IN THE SUPREME COURT OF VIRGINIA ON APPEAL FROM THE CIRCUIT COURT OF LOUISA COUNTY

a) From transcript dated July 25,
1981, the Court speaking, page 1:

"The difficulty that faces the Court is that we on motion of various counsel [John Lowe and his counsel] prohibited the introduction of any evidence concerning matters behind the decision of the Circuit Court of the City of Charlottesville which is a subject now being reviewed by the Supreme Court [Virginia] therefore this Court is in no position to rule as to whether or not that evidence would have influence on the Court's ruling in this case."

b) From Byrums Petition for Appeal
Filed with the Virginia Supreme Court on the
Louisa County Circuit Court Rulings:

Page 30: "The Court [Louisa Circuit Court] erred to exclude evidence relating to Lowe and Gordon's Attorney Client Contract and as it realted to a claimed default [Judgment]...The Byrums argue this exclsuion of evidence denys them due process...for these reasons the Byrums should have a review of the lower Court's decisions."

The Supreme Court of Virginia on affirm-
 ing the Circuit Court of Charlottesville's
 decision in the same instance ruled in denying
 a writ of review that "no reversible error"
 was found in the Circuit Court of Louisa
 County. Thus, the Supreme Court of Virginia
 has ruled on the federal issue of due process
 that was raised in both cases as the record
 clearly shows.

A sensbile and objective reader
 can see clearly that Respondents have mis-

represented that they "carefully reviewed" documents in their own hands to have ignored all of the above. And as to some of the specific representations made by the Respondents, for instance, that the "Byrums chose to ignore the proceedings and...there has been no deprivation of due process" (page 23 of Opposition Brief), such borders on a blatant misrepresentation to this Court and a callous disregard for the Byrums' rights.

Justice Holmes stated in Davis v. Wechsler 44 S. Ct. 13, 14 263 U.S. 22, 24 (1923), "whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonable made, is not to be defeated under the name of local practice." The State Courts have denied any relief to the Byrums on the issue of due process and the record makes that self evident. Even a state procedural rule

asserted by Lowe and Gordon of general applicability that it interferes unduly with the presentation of federal questions. Brown v. Western Ry. of Alabama 70 S. Ct. 105, 388 U.S. 294. (1949)

The decisions are repugnant to the U.S. Constitution in their results and violate due process under the Fourteenth Amendment as guaranteed to these two U.S. Citizens. The Byrums preserved the federal issues, had them ruled upon and submit that action by this Highest Court of America is absolutely necessary for the Byrums to not be deprived of money and property without due process of law as guaranteed by the United States Constitution.

CERTIFICATE OF SERVICE

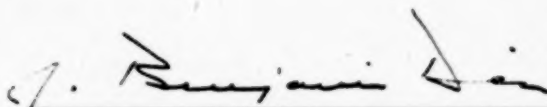
This is to certify that three corrected copies of this Reply Brief have been served on all parties required to be served, i.e., on Respondents by placing same in

an envelope and depositing it in the United States mail, regular postage prepaid, addressed to counsel of record as follows the 1st day of November, 1983.

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J. Benjamin Dick

APPENDIX A
OPINIONS AND JUDGMENTS BELOW
FROM THE SUPREME COURT OF VIRGINIA

SUPREME COURT OF VIRGINIA

No. 801458
Circuit Court No. L-1879

Filed October 21, 1983

ELIZABETH Y. BYRUM, et al., Appellants,

v.

LOWE & GORDON, LTD., Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellants, by counsel, praying that the court defer issuance of its mandate in this case until proceedings in the Supreme Court of the United States have been terminated, it is now ordered that the execution and enforcement of the judgment of this court rendered on April 29 and June 17, 1983, be, and the same is hereby, stayed until the final determination of the case by the Supreme Court of the United States.

/s/ Allen L. Lucy
Clerk

SUPREME COURT OF VIRGINIA

No. 811900
Circuit Court No. C-2319

Filed October 21, 1983

BARNEY L. BYRUM, et al.,
Appellants,

v.

GARY B. PATTERSON, Trustee, et al.,
Appellees.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellants, by counsel, praying that the court defer issuance of its mandate in this case until proceedings in the supreme Court of the United States have been terminated, it is now ordered that the execution and enforcement of the judgment of this court rendered on June 17, 1983, be, and the same is hereby, stayed until the final determination of the case by the Supreme Court of the United States.

/s/ Allen L. Lucy
Clerk